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Introduction: The Constitution of Criminal Justice in Canada

Benjamin L. Berger^{*} and James Stribopoulos^{**}

In 1975, seven years before the *Canadian Charter of Rights and Freedoms*¹ entered onto the Canadian constitutional landscape, philosopher Reginald Allen wrote the following in a Canadian publication on courts and the trial process:

It is in the criminal process that the law and government most narrowly touch, beneficently and also dangerously, the lives of the governed. And it is here that instinct and passion beat hardest on rationality and restraint.²

Allen's words offer not only a lyric depiction of the animating tensions that make the criminal justice system such a crucial point for social and political inquiry, but also invite a legal historical question, a question that supplies the focus of this volume: what effect has the Charter had on the nature and quality — on the justness — of this crucial point of contact between government and the governed? Have the legal rights contained in the Charter served as legal ligatures, tying the Canadian criminal justice system to the mast of reason and restraint?

To be certain, the hope was that a new era of criminal law and procedure within a constitutional rights regime would create a more just system, one that would be more humane and fair for all, one that would more effectively bind state power and that would better protect both society and the accused — a system, in short, that would better strike that elusive balance between due process and crime control inimitably

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¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

² Reginald Allen, "The Trial of Socrates: A Study in the Morality of the Criminal Process" in Martin L. Friedland, ed., *Courts and Trials: A Multidisciplinary Approach* (Toronto and Buffalo: University of Toronto Press, 1975), 3 at 4.

described, years earlier, by Herbert Packer.³ All law reform imagines itself as part of the progressive realization of justice, but in this case there were structural bases for a more palpable and potent hope. More than a quotidian reform (if only meaningful criminal justice reform could be characterized as quotidian), this was a constitutional paradigm shift. The Charter would mark a shift away from a 200-year tradition of adversarial criminal justice in a world of parliamentary supremacy to a model in which the judicial branch would be formally vested with responsibility for checking executive and legislative action based on constitutional text. The hope of Charter enthusiasts was that the reason and restraint of the law would truly rule over the passions and instincts of criminal justice politics.

This hope was quickly nourished. In the early years of the Charter, the Supreme Court of Canada invoked this new rights régime to make significant alterations to substantive and procedural aspects of the Canadian criminal justice system. Substantively, the Court moved to reform the law of fault, first declaring a minimum objective *mens rea* requirement for deprivations of liberty,⁴ and later invalidating Canada's constructive murder provisions through reasoning about the constitutional demands for subjective *mens rea*.⁵ On the procedural side, the Court's early decisions suggested a radical transformation both of police powers, beginning with the incorporation of a constitutional warrant requirement into the law of search and seizure,⁶ and in the adjudicative process, with the Court's landmark ruling on Crown disclosure.⁷ For at least the first 10 years with the Charter, it seemed that the constitutionalization of criminal justice would prove axial, radically transforming not only the way that criminal justice was administered, but the very way that it would be thought about and debated, and leading progressively to a criminal law that would be covetous of individual rights and insulated from the changing temperature of political passions.

³ James Stribopoulos, "Packer's Blind Spot: Low Visibility Encounters and the Limits of Due Process Versus Crime Control" in François Tangay-Renaud & James Stribopoulos, eds., *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Oxford and Portland: Hart Publishing, 2012) 193.

⁴ *Reference re Motor Vehicle Act (British Columbia) s. 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.).

⁵ *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.); *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

⁶ *Canada (Combines Investigation Act, Director of Investigation and Research) v. Southam Inc.*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 (S.C.C.).

⁷ *R. v. Stinchcombe*, [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326 (S.C.C.).

Thirty years on, what can be said of the legacy of the Charter in the Canadian criminal justice system? It would be both hyperbolic and facile to say that no substantial gains have been won through three decades with the Charter. The examples already cited are some such advances; the fact that capital punishment is seemingly banished from Canada is surely a profound systemic enlightenment.⁸ More broadly, the Charter has introduced a newly potent vocabulary for challenging the substantive limits of the criminal law.⁹ Yet it would be Pollyannaish to imagine that the system has moved inexorably in the direction of the just and restrained or that the fundamental political and social struggles of Canadian criminal justice have changed by virtue of 30 years with the Charter. This is to say more than that doctrinal evolution has been incomplete or even regressive at times, though that is true and important.¹⁰ In many respects, the more significant observation is that the Charter has done little to disrupt the politics of criminal justice.¹¹ The protection against cruel and unusual punishment has done virtually nothing to inhibit (and may have given political warrant to) the proliferation of minimum sentences;¹² the Charter has had no discernable impact on the Aboriginal peoples' violent experience of the Canadian criminal justice system;¹³ and police powers and discretion have arguably expanded over the last 30 years.¹⁴ So what can be said of the legacy of the Charter in the criminal justice system? The impact of the Charter is complex, ambivalent as a normative matter, elusive as a political matter, and very much still unfolding. It is, in short, a profoundly unsettled legacy.

And so despite a significant change in the available legal tools and in the constitutional architecture of criminal justice in Canada, what is most striking is that the story after 30 years with the Charter is as much one of continuity in logic and patterns, as it is one of change. The introduction of the Charter has not signalled a reinvention or revolution in the basic debates and struggles in Canadian criminal justice. Traditional criminal justice politics and history largely carry on, albeit through other means and in a new constitutional key. Consider, for example, that the fundamental lines and terms of debate on that central substantive issue — the

⁸ *United States of America v. Burns*, [2001] S.C.J. No. 8, [2001] 1 S.C.R. 283 (S.C.C.).

⁹ See *R. v. Marmo-Levine*; *R. v. Caine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571 (S.C.C.).

¹⁰ See the essays by Gerry Ferguson, Emma Cunliffe and Martha Shaffer in this volume.

¹¹ See the essay by Don Stuart in this volume.

¹² See the essays by Debra Parkes and Allan Manson in this volume.

¹³ See the essays by Larry Chartrand and Jonathan Rudin in this volume.

¹⁴ See the essays by Steve Coughlan and Vanessa MacDonnell in this volume.

limits of the criminal law — have not significantly altered since the Hart-Devlin debate of the 1960s and 1970s¹⁵ and, arguably, since John Stuart Mill. Putatively ushering in a new era in limited government, the Charter has in fact occasioned almost no change in the shape of the debate about, or the actual boundaries of, Canadian criminal law. Lord Devlin and H.L.A. Hart would be perfectly comfortable with the terms of the Supreme Court of Canada's Charter deliberations on the limits of the criminal law.¹⁶ It may be that judges are now more intimately involved in these conversations; whether that has affected the democratic quality of Canadian criminal justice is perhaps the only incontrovertibly new debate occasioned by the Charter. The story of continuity is even more striking on the procedural side. Thirty years in, we can now observe, with irony, that the constitutional rights era in Canadian criminal procedure has actually ushered in a renaissance for common law police powers.¹⁷ The exigency of policing in service of crime control, not the primacy of liberal conceptions of negative freedom, remains the standard-bearer for police powers in Canada. As this volume is published, Canadians are living in a politically driven atmosphere of harsh justice that the existence of the Charter seems to have done little to inhibit.

That, despite its transformative pretensions, the legacy of the Charter in Canadian criminal justice is so ambiguous is perhaps unsurprising. Criminal justice deals with action and experience at the boundaries of comprehension, participates in an economy of power and violence, and is above all a human institution that seeks to manage the remains of social breakdown and to impose some kind of order and meaning on suffering.¹⁸ Criminal justice thus takes place at the limits of our understanding about how to respond; no change in legal tools alters this human dimension of crime and social policy. In the criminal justice system, instinct and passion will always beat on rationality and restraint, as Allen puts it, and though the terms and tools might shift, this ineradicably “political”

¹⁵ Patrick Devlin, “Morals and the Criminal Law” in *The Enforcement of Morals* (London, Oxford and New York: Oxford University Press, 1965) 1; H.L.A. Hart, “Immorality and Treason” in Richard A. Wasserstrom, ed., *Morality and the Law* (Belmont, CA: Wadsworth Publishing, 1971) 49.

¹⁶ See, e.g., Benjamin L. Berger, “Moral Judgment, Criminal Law and the Constitutional Protection of Religion” in Jamie Cameron & James Stribopoulos, eds. (2008) 40 S.C.L.R. (2d) 513.

¹⁷ James Stribopoulos, “In Search of Dialogue: The Supreme Court, Police Powers and the Charter” (2005) 31 Queen's L.J. 1.

¹⁸ See Benjamin L. Berger, “On the Book of Job, Justice, and the Precariousness of the Criminal Law” (2008) 4:1 Law, Culture, and the Humanities 98.

heart of criminal justice means that no Whiggish stories can be told, even of legacies of constitutional change.

The contributions to this volume, prepared for Osgoode Hall Law School's Constitutional Cases Conference in the spring of 2012, explore the law and politics of Canadian criminal justice after 30 years with the *Canadian Charter of Rights and Freedoms*. Through these essays one gains a fine appreciation not only of the complexity of the Charter's impact on all dimensions of the criminal justice system, but of the perennial struggles that lawyers, judges, politicians and scholars face in seeking to make Canadian criminal justice more just. Don Stuart and Rosemary Cairns Way begin the volume by pulling back to consider broad trends and influences within criminal law over the last 30 years. Stuart squarely takes up the interaction of politics and criminal law, tracing the ways in which the Charter has and has not shaped the influence of law-and-order politics on our justice system. Cairns Way turns our attention to a Charter value that is meant to infuse our legal system — equality — and calls on us to critically assess the extent to which an ethic of substantive equality has infused the criminal justice system in the last 30 years.

The twin themes of politics and social justice inflect the contributions that assess various impacts of the Charter on the state of substantive criminal law. The effect of the Charter on the political balance between the legislature and the judiciary is an important debate that has taken place in the last three decades with the Charter and Alana Klein focuses on the impact of the “great” legal right, section 7 of the Charter, on the role and jurisdiction of the legislature in substantive criminal law. In his contribution, Alan Young further interrogates the limits of the criminal law, offering an analysis that focuses on liberty as a pivotal concept in Charter criminal jurisprudence. Political will, constitutional limits, and the intersection of substantive criminal law and equality are all woven together in Gerry Ferguson's careful analysis of the story of the law of intoxication in the Charter era. This section of the volume concludes with two pieces that address a legal and political flashpoint in contemporary criminal justice policy: mandatory minimum sentences. Debra Parkes analyzes the limited impact that the Charter has had on the proliferation of mandatory minimum sentences, providing an invaluable window onto the dynamic between constitutional law and political will. Allan Manson takes up similar issues, ultimately suggesting that a standard for assessing the constitutionality of minimum sentences based on arbitrariness

would better capture the justice concerns with these hotly contested measures.

The 30-year Charter journey of Canadian criminal procedure has been both tumultuous and complicated. Steve Coughlan begins the section of this volume on “Due Process and Its Limits” by offering a subtle and illuminating conceptual model for understanding the impact of the Charter on police powers. An unexpectedly important player in the unfolding story of police powers in the Charter era has been the ancillary powers doctrine, a controverted doctrine whose impact is not yet settled and is the focus of Vanessa MacDonnell’s contribution to this collection. From this broader foundation, Lisa Dufraimont and Steven Penney focus our attention on two related and intricate areas of Charter criminal procedure: the principle against self-incrimination and the law of police questioning. Dufraimont traces the many sites in which expressions of the principle against self-incrimination has appeared in constitutional criminal law, while Penney takes a careful look at the various modes of legal management of the problem of false confessions in the Charter era.

The theme of criminal justice and equality comes into high relief in the final two sections of the volume. Perhaps no issue has more troubled Charter justice in criminal law than questions of gendered violence and sexual assault. Emma Cunliffe looks back over the jurisprudence on sexual assault and critically compares it to Canadian constitutional aspirations for substantive equality. Stitching together issues of gender violence and the limits of the criminal law, pornography has tested the force, scope and nature of the Charter’s impact, as Michael Plaxton explores in his piece on the *Butler* decision. Martha Shaffer closes this section on gender violence and sexual assault in an essay that emphasizes the political and legal continuities in the domain of sexual violence over the last 30 years, despite early hopes that the Charter would bring about progressive change in this area.

Struggles to reckon with racial and ethnic equality, cultural difference and Aboriginal peoples shine another critical light on the play of politics and equality in the Charter-era criminal justice system. In her essay, Carissima Mathen looks at recent debates on the constitutionality of the crime of polygamy as a crucible for understanding the cultural force of both Canadian criminal justice and the Charter, and Jonathan Rudin and Larry Chartrand underscore the violence experienced by Aboriginal communities at the hands of the Canadian criminal justice system, an experience that the existence of the Charter has not palliated. Rudin takes stock of the past and invites us to think about the future of

criminal justice in a close analysis of the Supreme Court of Canada's Aboriginal sentencing decisions, while Chartrand ends the collection, exploring what section 25 of the Charter might say about the sentencing of Aboriginal offenders, one of the most fraught political expressions of Canadian criminal justice.

Taken together, the essays in this volume paint a picture that invites neither complacency nor despondency about the effect of the Charter on the justness of the Canadian criminal justice system. Rather, these leading scholars of Canadian criminal law have mapped for us the way in which the abiding challenges involved in the social and political effort to wrestle with wrongdoing, responsibility, blame and the dangers of state power have expressed themselves in a new constitutional architecture. In this, the volume sits at the vanishing point for the distinction between constitutional and criminal law, the point at which, in Reginald Allen's words, "law and government most narrowly touch, beneficently and also dangerously, the lives of the governed". This volume is a study in Canadian political and constitutional history, for as Allen himself observed:

It is not by accident that the history of constitutional law, from chapter twenty-nine of Magna Carta to the Petition of Right, the Habeas Corpus Act, and the bills of rights — English, American, Canadian — may very largely be written as a history of criminal procedure.

The past 30 years of criminal justice under the legal rights of the Charter thus take their place as a chapter in this unfolding story of Canadian constitutional law and politics.

